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**ISSUE 023:** May 2012 **Craig Langstone, Partner**

## Insurance Broker's Negligence and the Canterbury Earthquakes

The first case of an insurance broker's negligence resulting from the Canterbury earthquakes has come before the Christchurch High Court (*Marchand & Ors v Jackson & Anor*, unreported, Christchurch High Court, CIV-2011-409-810, Matthews AJ, 2 May 2012). The plaintiffs, Nicola and Jacques Marchand, and Patrick Costello, claimed that insurance broker John Jackson told them in 2009, and again in 2010, that he had arranged insurance cover for them with IAG's subsidiary NZI, but had not in fact done so. They only found out after the September 2010 earthquake that their home, contents, motor vehicles and assets in a medical practice were not insured.

The Marchands had in May 2009 engaged Jackson to arrange insurance cover for their assets. Jackson recommended NZI as the best prospect for appropriate cover. NZI emailed Jackson a quote and an offer of cover on 1 July 2009 but Jackson did not refer the quote to the plaintiffs. Nonetheless, in late July or early August 2009, Jackson told Mrs Marchand over the telephone that she and her husband had cover for their house, contents and vehicles, even though this was not true. Early in 2010 Mrs Marchand telephoned Jackson and was again told that their property was insured when it was not.

The plaintiffs' house and contents suffered serious damage in the September 2010 earthquake but the plaintiffs found themselves uninsured and without access to compensation from the Earthquake Commission. Their property suffered even more damage in the 22 February 2011 earthquake. The plaintiffs then issued Court proceedings against Jackson to recover their losses.

Jackson said in his defence that he had a heavy workload, he forgot to review the Marchands' insurance and he inadvertently failed to follow it up, partly caused by their insurance papers being wrongly filed and also because his memory had been badly affected by illness – a heart attack and a stroke. Evidence was filed from a psychiatrist to

support this "defence". The psychiatrist said that whilst the illnesses provided no organic explanation for Jackson's "inattentions and lapses", it was likely that the combination of physical, social and relationship losses would have been distracting and would have interfered with Jackson's work performance.

However despite this, in May 2010 when Mrs Marchand made a claim for a pair of glasses, Mr Jackson paid the claim himself (the claim being for a few hundred dollars). Jackson said that he paid the claim because he realised at that time he had not placed the insurance for the plaintiffs.

Jackson joined IAG, his professional indemnity insurer, into the proceedings as a third party. Jackson claimed that IAG should indemnify him under his PI policy for any losses that the plaintiffs suffered. In response, IAG sought summary judgment against Jackson on the basis that it should not have to cover him, due to the effect of two policy exclusions.

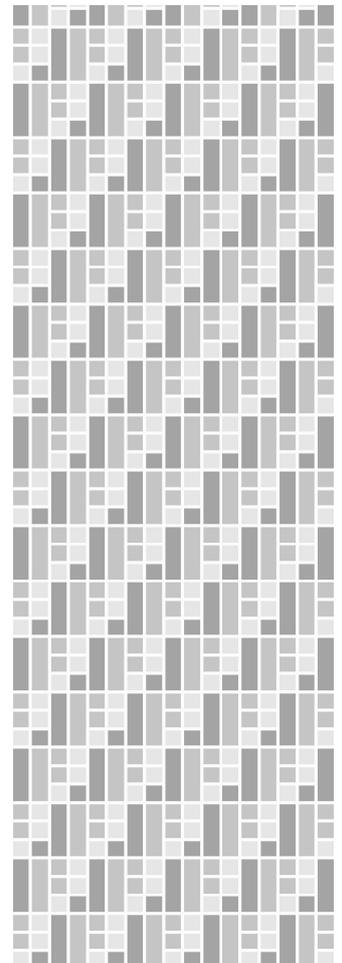
To further complicate matters, when Jackson renewed his PI cover with IAG in February 2010, he ticked the "Yes" box on the proposal which asked if he had received a claim or knew of circumstances that would lead to a claim. This was of course after Jackson had failed to obtain insurance for the plaintiffs in May 2009 but before the plaintiffs had any claims under the intended NZI policy. When IAG inquired about the answer given, Jackson told IAG that he had ticked the "Yes" box in error. Accordingly Jackson's PI insurance was renewed from 12 May 2010 to 12 May 2011 (the relevant PI policy period for the plaintiffs' earthquake claims).

Various defences were raised by IAG to Jackson's PI claim but for the purposes of the summary judgment application by IAG, only two defences required consideration, namely:

- (a) That Jackson was not insured for civil liability in connection with any dishonest act (Exclusion E); and



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(b) That Jackson was not insured for civil liability in connection with any known claims or circumstances (Exclusion Q).

Although the Court said that Jackson's conduct was deliberate and had the appearance of being dishonest, the Judge was left with "a real doubt" about whether a finding of dishonesty was appropriate at the summary judgment stage. Associate Judge Matthews said grossly negligent conduct did not equate to dishonest conduct and the Court really needed to consider all surrounding circumstance before making a finding of dishonesty. On that basis, the application for summary judgment based on a dishonest act failed.

The application for summary judgment based on the known circumstances exclusion also failed because Jackson claimed that he had forgotten about the plaintiff's insurance problem at the time he renewed his cover with IAG. The Associate Judge said that Mr Jackson's claim to have forgotten about the possible claim against him must be read in light of the medical circumstances affecting his ability to function properly at work. Accordingly the Court was not prepared (at the summary judgment stage at least) to conclude that Jackson had deliberately failed to inform IAG of the potential claim the plaintiffs had against him.

The net result is that IAG remains a party to the High Court proceedings and will, in the fullness of time, have to face up to the claim brought by Jackson. IAG may feel somewhat hard done-by. However the medical evidence about the health problems suffered by Jackson and their effect on his ability to function at work, probably impacted on the Court's decision. The fact that this seemed to be a "problem file" for Jackson may also have helped him. Jackson did not benefit in any way from his allegedly dishonest conduct and that may also have influenced the Court's decision.

Whatever the eventual outcome, there has to be some sympathy for the plaintiffs. The plaintiffs went to an insurance broker for cover, were told cover had been arranged for them but nonetheless were left without insurance cover and EQC cover as a result. If IAG's defence under Jackson's PI policy ultimately succeeds, and Jackson is not worth "powder and shot", the plaintiffs will be out of pocket through no fault of their own.

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